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No. 96-193

In The

Supreme Court of the United States

October Term, 1995

MARTIN W. MYERS,

Petitioner,

vs.

THOMAS C. BURNS, HOITE C. CASTON, K. RICHARD KEELER, PATRICIA SADLER MUNDELIUS, Trustees of the Urantia Foundation, and PHILIP A. ROLNICK, an individual represented to be a newly elected Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Whether Illinois law requires the trustees of a private trust to do anything more than comply with the terms of the trust when removing a trustee?

2. Whether the due process clauses of the United States Constitution apply to the actions of the trustees of a private trust?

PARTIES TO THE PROCEEDING

All parties to the proceeding are correctly named in the caption of the case. However, Respondents disagree with Petitioner's characterization of Respondent Phillip A. Rolnick's status as an "individual represented to be a newly elected Trustee." Respondent Phillip A. Rolnick is a duly elected Trustee of the URANTIA Foundation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iii
Counterstatement of the Case	1
Proceedings Below	4
Reasons for Denying the Writ	6
I. The lower courts correctly applied Illinois law.	8
II. There is no legal basis for Petitioner's theory of "contractual due process"	9
III. The due process clauses of the United States Constitution do not apply to the actions of the trustees of a private trust.	15
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Bean v. Norfolk & Western Ry. Co., 84 Ill. App. 3d 395, 405 N.E. 2d 418 (1980)	14

Contents

Page

Braxton v. United States, 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) 1

Clift v. UAW, 818 F.2d 623 (7th Cir. 1987) 15

Consolidated Bearings Co. v. Ehert-Krahn Corp., 913 F.2d 1224 (7th Cir. 1990) 14

Duldulao v. St. Mary of Nazareth Hospital, 115 Ill. 2d 482, 505 N.E. 2d 314 (1987) 12

Estate of Steward, 480 N.E. 2d 203 13

First Nat'l. Bank of Chicago v. Canton Council of Campfire Girls, Inc., 85 Ill. 2d 507, 426 N.E. 2d 1198 8

Ford v. Newman, 77 Ill. 2d 335, 396 N.E. 2d 539 (1979) 8

Gorin v. McFarland, 108 Ill. App. 2d 348, 247 N.E. 2d 620 (1969) 8, 13

Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192 (7th Cir. 1987) 12

In re Estate of Steward, 134 Ill. App. 3d 412, 480 N.E. 2d 201 (Ill. App. 1985) 8

May v. May, 167 U.S. 309 (1987) 10, 11

Contents

Page

National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988) 15

Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois, 253 Ill. App. 3d 525 (1st Dist. 6th Div. 1993) 13

Robinson v. Ada S. McKinley Community Services, 19 F.3d 359 (7th Cir. 1994) 12

Shelley v. Kramer, 334 U.S. 1, 92 L. Ed. 2d 1161, 68 S. Ct. 449 (1948) 15

Steger v. Northen, 229 Ill. App. 529 (1 Dist. 1923) 11

Stuart v. Continental Ill. Nat. Bank & Trust, 68 Ill. 2d 502, 369 N.E. 2d 1262 (1977) 8

Statute Cited:

Illinois Charitable Trust Act, S.H.A. § 760 ILCS 55/1, *et seq.* 1

United States Constitution Cited:

Fifth Amendment 9, 12, 13, 15

Fourteenth Amendment 9, 12, 13, 15

Contents

Page

Rule Cited:

Supreme Court Rule 10 ..... 1, 16

Other Authorities Cited:

G.C. Bogert, *The Law of Trusts and Trustees*, § 520 10

W. Flatcher, *Scott on Trusts*, § 107.2 10

The URANTIA Book 3, 6

I

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari because this case does not implicate any of the considerations governing review on certiorari which are set forth in Rule 10 of the Court's Rules. This Court has emphasized that the "principal purpose for certiorari is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of *federal law*." *Braxton v. United States*, 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) (emphasis added); Rules of the Supreme Court, Rule 10. This case does not present a conflict among the circuit courts or state courts as to the meaning of federal law. Indeed, this case has nothing to do with federal law. As explained below, the Northern District of Illinois and the Seventh Circuit correctly dismissed Petitioner's complaint after they applied settled principles of Illinois trust law to the undisputed material facts of this case.

COUNTERSTATEMENT OF THE CASE

The URANTIA Foundation is a charitable common law trust within the meaning of the Illinois Charitable Trust Act, S.H.A. § 760 ILCS 55/1, *et seq.* It was created in 1950 by anonymous contributors pursuant to a Declaration of Trust. The Foundation is governed by a Board of Trustees. In the Declaration of Trust, the contributors empowered the trustees to remove a fellow trustee "for any reason." Section 7.5 of the Declaration of Trust provides:

> 7.5 REMOVAL OF TRUSTEE: *Any Trustee may be removed for any reason* by a unanimous vote of the remaining trustees, and upon the casting of such a unanimous vote of the remaining trustees, they shall thereupon execute a certificate under the hands and seals of said remaining trustees

> certifying to the casting of such vote and to the removal of such trustee, and the same shall be filed for record as provided in paragraph 9.1. Upon the execution and recordation of such certificate, a vacancy and the number of trustee shall be deemed to exist.

The contributors also directed the trustees to "adopt by-laws, not inconsistent with the provisions of [the] Declaration of Trust, for the government of the Foundation and of the acts and procedures of the trustees. . . ." Section 2.4 of the By-Laws addresses the issue of removal. It provides for the trustees to "cast a ballot on the question of whether or not such trustee should be removed":

> [w]hen, in the opinion of a majority of the trustees, [a] trustee has failed or refused to assume and perform his duties and responsibilities, or has done or permitted any act or thing which is inconsistent with or in degradation of the teachings of *The URANTIA Book*, or by his acts or omissions has brought disrepute upon himself or URANTIA Foundation. . . .

Section 2.4 further provides that if a majority of the trustees agree that removal is appropriate, they shall vote again at three consecutive, quarterly board meetings. If all the trustees, except the one to be removed, votes for removal at each of the three subsequent meetings, the trustee will be removed. Section 2.4 also states that "[n]o part of the [removal] deliberation . . . shall be included or recorded in the minutes of the meetings of the board of trustees, but the ballot cast at each meeting on the question of whether or not such trustee is to be removed shall be recorded."

There is no requirement in either the Declaration of Trust or By-Laws that the removal candidate be provided "written charges" or "a fair due process hearing," or that any specific procedures must be followed to remove a trustee. The Declaration of Trust instead allows the Foundation's trustees to remove a fellow trustee "for any reason." The By-Laws only require the remaining trustees to vote unanimously in favor of the removal at the three consecutive, quarterly board meetings after they make the initial decision to remove a trustee. Neither of these documents require written "charges" or specify any particular procedures for removing a fellow trustee.

The undisputed material facts concerning the steps taken by Respondents to remove Petitioner from the Foundation's Board of Trustees are summarized in the opinions of the Northern District of Illinois (Appendix C to Petition) and the Seventh Circuit (Appendix A to Petition). Both the district and circuit court opinions explain that Respondents complied with the requirements of the Declaration of Trust and the By-Laws because they made a unanimous decision to initiate Petitioner's removal and subsequently voted unanimously in favor of removal at the next three consecutive board meetings. In fact, the Petitioner's own statement of the case acknowledges that Respondents complied with the requirements of the Declaration of Trust and the By-Laws when they removed Petitioner from the Foundation's Board of Trustees. Nonetheless, Petitioner claims that, based upon "the Urantia Foundation teachings," upon certain passages from *The URANTIA Book*, and upon the manner in which another trustee was removed in 1984, as a matter of "contractual due process," Respondents could not remove him without first providing "written charges" and conducting what Petitioner calls a "fair, due process hearing."

PROCEEDINGS BELOW

On October 25, 1993, Petitioner filed suit in the Circuit Court of Cook County to challenge the decision of Respondents to remove him from the Foundation's Board of Trustees. Respondents removed the case to the United States District Court for the Northern District of Illinois, Eastern Division. The removal was based solely on the district court's diversity of citizenship subject matter jurisdiction because this case does not present any issues of federal law. Respondents subsequently filed their motion for summary judgment based upon the undisputed facts which show that Respondents complied with the unambiguous terms of the Declaration of Trust and the Foundation's By-Laws when they removed Petitioner from the Foundation's Board of Trustees. On May 9, 1995, the district court granted Respondent's motion and rejected Petitioner's contention that he was entitled to a trial-like hearing and other "due process" protections before the other trustees could remove him from the Board of Trustees.

The district court held that, under Illinois law, the only legal issue presented by this case was whether Respondents complied with the terms of the trust when they removed Petitioner from the Foundation's Board of Trustees. (Petition, C-9). The district court found that the Declaration of Trust, which created the URANTIA Foundation, unambiguously permits the removal of a trustee "for any reason by unanimous vote of the remaining trustees" (Petition, C-9), and that the undisputed facts show that Respondents " . . . voted unanimously, not once, but several times, to remove [Petitioner]." (Petition, C-9). In response to Petitioner's claim that Respondents were required to do something more in order to remove him as a trustee, the district court held that "imposition of the restrictive procedural requirements suggested by [Petitioner] would be patently inconsistent with the broad, essentially unfettered, removal

powers conveyed by [the specific removal provision] of the [Declaration of Trust]." (Petition, C-11). The district court also concluded that the Declaration of Trust preempted any additional procedural requirements that Petitioner claimed were imposed by the By-Laws or any other source, and that the By-Laws, in any event, do not require the procedures sought by Petitioner. (Petition, C-11). The district court also held that, under Illinois law, evidence of the procedures followed when on one prior occasion a trustee was removed has no bearing on this case because any specific procedures used when that trustee was removed were not required by the terms of the trust. (Petition, C-12). The district court concluded that Respondents' removal of Petitioner from the Board of Trustees "complied with all the requirements of the governing trust instrument." (Petition, C-12, 13). On this basis, the district court entered summary judgment against Petitioner and dismissed his complaint.

Petitioner subsequently filed his notice of appeal and asked the Seventh Circuit to review the district court's decision. On April 9, 1996, the Seventh Circuit affirmed the district court's judgment in an unpublished opinion and emphasized that ". . . the procedure for removing [Petitioner] conformed with the Declaration of Trust." (Petition, A-3). The Seventh Circuit noted that Petitioner makes "voluminous arguments" which "focus on the reasons why the other trustees wrongly voted to terminate him." (Petition, A-4). The Seventh Circuit concluded that

> While [Petitioner] obviously disputes the distasteful facts leading up to his discharge, it is not the duty of this court to sort out the unfortunate facts surrounding this dispute. Rather, we look only at whether the terms of the trust were properly executed.

(Petition, A-4). The Seventh Circuit agreed with the district court

that it is not appropriate for the courts to review the reasons why Respondents decided to remove Petitioner:

> [Petitioner] attempts to draw the court into his dispute with the Urantia Foundation by referencing several distasteful controversies involving him and other trustees. We need not involve ourselves with the personality conflicts that led to [Petitioner's] removal. We need only apply the trust documents. That application is straightforward; the Board of Trustees complied with the Declaration of Trust and the By-Laws in removing [Petitioner] as a trustee.

(Petition, A-5).

On May 6, 1996, the Seventh Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc. Petitioner now files his Petition for Writ of Certiorari and asks this Court to exercise its discretionary jurisdiction to consider the same meritless arguments which already have been soundly rejected by two lower courts.

REASONS FOR DENYING THE WRIT

Petitioner argues that Respondents were required to do far more than comply with terms of the trust when they removed him from the Foundation's Board of Trustees. He goes to great lengths to repeat the same argument that was soundly rejected by both the district court and the court of appeals, namely, that the Declaration of Trust, the Foundation's By-Laws, the "Urantia Foundation teachings," and certain passages from *The URANTIA Book* (including a passage which describes Pilate's refusal to sentence Jesus to death without a trial), when read

together, somehow grant Petitioner a right to "contractual due process." Petitioner argues that this fabricated right to "contractual due process" required Respondents to provide "written charges" and to conduct a "fair, due process hearing" as part of the removal process.

However, as both lower courts correctly held, Petitioner's argument has no basis in fact or law. As explained above, the undisputed evidence is that Respondents, when they removed Petitioner from the Board of Trustees, followed the terms of the trust to the letter, and that the unambiguous language of both the Declaration of Trust and the By-Laws do not require the procedures to which Petitioner claims he is entitled. Moreover, as explained below, both lower courts correctly applied well-settled principles of Illinois trust law to hold that Respondents were only required to comply with the requirements of the trust instrument in removing Petitioner. The reasons for their decision to remove Petitioner are immaterial and are not subject to judicial review. Petitioner also has no legal or factual basis for his theory that "contractual due process" required Respondents to provide him with "written charges" and a "fair, due process hearing" before they removed him from the Board. As explained above, there are simply no such requirements in the trust documents. As explained below, there is no rule of law which requires the trustees of a private trust to hold a trial and to comply with the due process requirements of the United States Constitution when they decide to remove a trustee.

I.

THE LOWER COURTS CORRECTLY APPLIED ILLINOIS LAW.

As emphasized in the opinions of both the district court and the court of appeals, "[t]he court's primary concern in construing a trust is to discover the settlor's intent, which the court will effectuate if it is not contrary to law or public policy." *First Nat'l. Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 426 N.E. 2d 1198, 1201. (Petition, C-9, A-3). Illinois trust law provides that, when, as in this case, the terms of the trust instrument are clear and unambiguous, a court must apply the trust document as written and without looking beyond its four corners. *Matter of Estate of Steward*, 134 Ill. App. 3d 412, 480 N.E. 2d 201, 203 (1985); *Ford v. Newman*, 77 Ill. 2d 335, 396 N.E. 2d 539, 540 (1979); *Stuart v. Continental Ill. Nat. Bank & Trust*, 68 Ill. 2d 502, 369 N.E. 2d 1262, 1271 (1977) ("It is axiomatic that the limits of a trustee's powers are determined by the instrument which creates the trust."); *In re Estate of Steward*, 134 Ill. App. 3d 412, 480 N.E. 2d 201, 203 (Ill. App. 1985). *See also First National Bank of Chicago v. Canton Council*, 426 N.E. 2d at 1201. "[I]t is not the function of a court to modify the document or create new terms. . . ." *Steward*, 480 N.E. 2d at 203. Thus, under Illinois law, a court cannot do as Petitioner suggests and impose additional restrictions or limitations which are not required by the trust instrument itself. *Gorin v. McFarland*, 108 Ill. App. 2d 348, 247 N.E. 2d 620, 622 (1969).

The lower courts correctly held that the only legal issue presented by this case is whether Respondents complied with the terms of the Declaration of Trust when they removed Petitioner from the Board of Trustees. As explained above, the undisputed evidence is that Respondents *did* comply with the terms of both the Declaration of Trust *and* the Foundation's By-Laws when

they removed Petitioner from the Board of Trustees. Petitioner continues nonetheless to argue that, despite the fact that there are no specific provisions in either the Declaration of Trust or the By-Laws, which require the procedures he seeks, Respondents were obligated as a matter of "contractual due process" to provide Petitioner with "written charges" and a "fair, due process hearing" before they could remove him from the Board of Trustees. As explained below, Petitioner's concocted theory of "contractual due process" is frivolous and lacks any factual, legal, or logical basis.

II.

THERE IS NO LEGAL BASIS FOR PETITIONER'S THEORY OF "CONTRACTUAL DUE PROCESS".

The apparent premise of Petitioner's so-called "contractual due process" theory is that no party is entitled to exercise its rights under an alleged contract unless it first conducts the kind of "trial" required by the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner's theory is specious for two reasons. First, a trustee of a charitable trust has no right, contractual or otherwise, to serve as a trustee. Second, the cases which Petitioner cites in support of his argument do not mention the term "contractual due process" or recognize any such concept.

The most obvious flaw in Petitioner's argument is the false premise that he possesses a *contractual right* to serve as a trustee. However, under settled principles of trust law, a trustee possesses no *personal* or "contractual" right to remain a trustee. To the contrary, the sole concern of a court of equity in reviewing the administration of a trust is the interest of the *beneficiaries*. Although a court of equity has authority to intervene to prevent abuse of the co-trustees' power to remove an individual trustee,

the concern of the court is for the rights of the beneficiaries of the trust and not for the removed trustee:

> If the power [to remove a trustee] is reserved to the settlor or given to co-trustees, the court of equity will intervene to prevent an abuse of the power. Here the question on which the court must pass, however, is *not* whether there was *cause* for removal, but whether any *beneficiaries* have been injured.

G.C. Bogert, *The Law of Trusts and Trustees*, § 520 at p. 29 (emphasis added). *Accord* W. Flatcher, *Scott on Trusts*, § 107.2, at 124 (the proper function of a court, in reviewing the exercise of the power to remove a trustee, is to "prevent its exercise in such a manner as to prejudice the rights of the *beneficiaries*" [emphasis added]).

Even in cases involving *judicial* removal of a trustee (rather than removal pursuant to the terms of the trust document by other trustees or the beneficiaries), the court's focus is solely on the rights of beneficiaries; the claimed right of the trustee to retain his position is not the issue. As this Court observed in *May v. May*:

> The power of a court of equity to remove a trustee, and to substitute another in its place, is incidental to its paramount duty to see that trusts are properly executed; and may be properly exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuancy in office *would be detrimental to the execution of the trust*, even if for no other reason than that

> human infirmity would prevent the co-trustees or the beneficiaries from working in harmony with him, and *although charges of misconduct against him are either not made out, or are greatly exaggerated.*

May v. May, 167 U.S. 309, 320 (1987). Thus, even when the judicial removal of a trustee is requested, the trustee has no "personal" or "contractual" right to withstand removal until he is "proven guilty" of some personal wrongdoing. This principle has been adopted in Illinois decisional law. *Steger v. Northen*, 229 Ill. App. 529 (1 Dist. 1923).

Moreover, as this Court recognized almost 100 years ago in *May v. May*, equity courts historically have viewed with suspicion and distaste any effort by a trustee to force himself upon the trust, as Petitioner seeks to do. Both this Court and the Illinois Court of Appeals have cited with approval an early decision of an English Lord Chancellor expressing this view. The Illinois Court of Appeals, describing this Court's opinion in *May v. May*, stated:

> And the court mentioned the case of *Uvedale v. Ettrick*, 2 Cha. Cas. 130, decided by Lord Chancellor Nottingham in 1682, where it appeared that Ettrick (a trustee appointed under a will and whose removal was sought) insisted on continuing in office as trustee, and quoted from the Lord Chancellor: "I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it," and who "declared that, without any reflection on Ettrick, he should meddle no farther in the trust, etc."

Steger v. Northen, 229 Ill. App. at 541.

Because Petitioner has no right, contractual or otherwise, to continue to serve as a trustee, even if there were such a thing as "contractual due process," there is no factual basis for Petitioner's theory that his "contractual" rights were violated by Respondents.

The only legal authority cited in support of Petitioner's concocted theory of "contractual due process" are cases which address the issue of whether provisions of an employee handbook can become enforceable terms of a written employment contract. *See, e.g., Robinson v. Ada S. McKinley Community Services*, 19 F.3d 359 (7th Cir. 1994); *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill. 2d 482, 505 N.E. 2d 314 (1987). The cases cited by Petitioner hold that, under certain circumstances, procedural requirements included in employee handbooks can become part of a written employment contract. However, the cases cited by Petitioner do not require the application of "due process" in the abstract. In fact, none of the cases cited by Petitioner mention the phrase "contractual due process." The phrase appears to be nothing more than a "buzzword" invented by Petitioner, as evidenced by the fact that the specific case which Petitioner cites as support for his statement that ". . . the concept of contractual due process has previously been recognized by the Seventh Circuit . . ." does not mention the term "contractual due process" or recognize any such concept. (Petition, p. 23); *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1199 (7th Cir. 1987) (holding that the appellant waived any claim that he had been "denied procedural protections guaranteed him by the collective bargaining agreement" by failing to raise the issue before the public law board). Moreover, none of the cases cited by Petitioner hold that an employer cannot discharge an employee without conducting a "trial" applying the same due process requirements imposed on courts and other governmental decision-makers by the Fifth and Fourteenth Amendments. In short, Petitioner's argument is an

unfounded and frivolous attempt to impose on all private actors the same due process requirements of the Fifth and Fourteenth Amendments as applied to governments actors in *Polk v. Board of Trustees of Police Pension Fund of City of Park Ridge, Illinois*, 253 Ill. App. 3d 525 (1st Dist. 6th Div. 1993).

Furthermore, none of the cases cited by Petitioner were decided under the law of trusts or purported to re-cast the relationship between the trustee and the trust as a contract that the trustee can use to restrict the other trustees in their exercise of the powers granted to them in the trust document. *Gorin v. McFarland*, 247 N.E. 2d at 622. To the contrary, as explained above, a trustee has no right, contractual or otherwise, to serve as a trustee.

Petitioner also repeats his argument that, in removing him, Respondents were "contractually" bound to follow the same procedures used in 1984 in the only other instance in Foundation history in which a trustee was removed. He argues that the lower courts should have imposed the prior procedure as an alleged "custom or practice" which restricts the unfettered removal power granted to the Foundation's trustees by the Declaration of Trust. However, both the district court and the court of appeals correctly held that this argument is foreclosed by the settled principle of trust law discussed above, requiring courts to apply the terms of the trust as written. Under Illinois law, a prior "custom or practice" of trustees, no matter how lengthy or consistent, can *never* limit or alter the powers granted to trustees by the trust document. *Gorin v. McFarland*, 247 N.E. 2d at 622 (trustees' twenty-five year practice of only acting on basis of unanimous vote could not create a *requirement* of unanimity when the trust instrument only required a majority vote); *see also Estate of Steward*, 480 N.E. 2d at 203 (a court cannot modify a trust document or create new terms).

Petitioner's "custom or practice" argument also fails for three additional reasons. First, the evidence of a "custom or practice" is only relevant when a term in a document is ambiguous or unclear. However, as explained above, there is no ambiguity in the trust document at issue in this case. The Declaration of Trust clearly states that the trustees can remove a fellow trustee "for any reason." The fact that the trust document does not require the procedures sought by Petitioner cannot create an ambiguity; it only means that the procedures sought by Petitioner are *not* terms of the trust. *Consolidated Bearings Co. v. Ehert-Krahn Corp.*, 913 F.2d 1224, 1233 (7th Cir. 1990) (the rights of the parties are limited to the terms expressed in a contract). Second, Petitioner's evidence of a "custom or practice" consists of a single prior event. As a matter of Illinois law, a single prior instance is insufficient to establish a "custom or practice." *Bean v. Norfolk & Western Ry. Co.*, 84 Ill. App. 3d 395, 405 N.E. 2d 418, 426 (1980). Third, the alleged "custom or practice" also is irrelevant because it did not exist when the trust was created. For a custom or practice to have any relevance, it must have existed at the time the document being construed was executed, and not after. *Id.* The single instance alleged by Petitioner as evidence of a "custom or practice" occurred in 1984, over 30 years after the Declaration of Trust was executed in 1950.

In sum, Petitioner's claim of "contractual due process" is utterly specious and lacks any factual, legal, or logical foundation.

III.

THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION DO NOT APPLY TO THE ACTIONS OF THE TRUSTEES OF A PRIVATE TRUST.

To the extent Petitioner bases his "contractual due process" argument on the due process clauses of the United States Constitution, his argument has no basis in law. It is fundamental that "[a]bsent the requisite *governmental* action, there can be no claim for constitutional due process." *Clift v. UAW*, 818 F.2d 623, 631 (7th Cir. 1987) (emphasis added); *see also National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988); *Shelley v. Kramer*, 334 U.S. 1, 13, 92 L. Ed. 2d 1161, 68 S. Ct. 449 (1948). This Court has consistently emphasized that the due process protections of the Fifth and Fourteenth Amendments "erect no shield against merely private conduct, however discriminatory or wrongful." *Shelley*, 334 U.S. at 13. Because the Foundation is a *private* trust, the due process provisions of the Fifth and Fourteenth Amendments simply do not apply and afford Petitioner no basis for his claim that he is entitled to so-called "contractual due process" protections.

CONCLUSION

The Petition should be denied because this case does not present any issue of federal law and does not implicate any of the other considerations governing the Court's review of a petition for certiorari as set forth in Rule 10 of this Court's Rules. Instead, the record shows that both the district court and the court of appeals correctly applied settled principles of Illinois law to the undisputed material facts of this case.

Respectfully submitted,

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